One step forward – three steps back: why the hellfire from Ramstein may continue after all

Karoline Do#gowski 2020-12-01T00:00:00

Maybe it is the time of the year that Ramstein Air Base looks even greyer and gloomier than usual in the cold November twilight, maybe it is the bitter thought of the decision the German Federal Administrative Court (Bundesverwaltungsgericht – short: BVerwG) has delivered on 25th November 2020 in the case of Jaber vs. the Federal Republic of Germany (FRG) denying any individual claim to further action by the German government to ensure compatibility with international law of US drone strikes operated via Ramstein (so far the full reasoning has not yet been published, but just a short press release). In light of the progressive decision of the OVG NRW below (which I commented on here) the decision of the BVerwG comes rather unexpected; and then again it is not really a surprise.

But let's take one step back and recall what Jaber vs. the FRG was all about and investigate why the decision of the BVerwG may put international lawyers in such a gloomy mood.

The case of Jaber vs. the FRG

The plaintiffs in the case at hand, three Yemeni men, lost two relatives in a drone strike on their village in 2012. The drone strike was carried out by US forces as a "signature strike", an attack where the US targets an unidentified person based on a pattern of suspicious behaviour as identified through metadata. Both relatives of the plaintiffs were not involved in terroristic activities and were presumably not the target of the drone strike but accidental victims. After unsuccessfully pursuing an action in the US, the plaintiffs turned to the FRG. They argued that because of the essential importance of Ramstein Air Base (located in Germany) for US drone strikes, it was the FRG's responsibility to prevent US air strikes via Ramstein that violate international humanitarian law (IHL) and human rights law (HRL). The first instance administrative court of Cologne dismissed the case in 2015. This judgment was overturned by the OVG NRW in 2019, which found that Germany had to adopt "suitable measures" to ensure that US drone strikes operated via Ramstein complied with international law, but was under no obligation to prevent drone strikes via Ramstein entirely. This obligation arose under the FRG's responsibility to protect under Article 2 (2) (1) of the German Basic Law (Grundgesetz – short: GG) guaranteeing the right to life. The OVG NRW affirmed the extraterritorial application of Article 2 (2) (1) GG if there was a "sufficient link" with the German territory which it saw in the use of Ramstein for the relay of data necessary for the drone strikes in Yemen. It held that assuring the compatibility of actions originating from German territory with international law was a legal question subject to judicial scrutiny – not a purely political matter triggering unlimited governmental discretion. Subsequently the

court found that there were strong indications for several possible violations of IHL and HRL through US drone strikes in Yemen, requiring further action of the German Government to ensure adherence of US actions to international law.

The judgment of the BVerwG of 25th November 2020

On appeal of the defendants, the BVerwG restored the first-instance judgment. It regarded the action as inadmissible concerning one of the three plaintiffs who does not live in Yemen and thus lacked standing. With regard to the other two plaintiffs, the BVerwG affirmed the admissibility, however held that the action was unfounded. It claimed that even though it was correct that Article 2 (2) (1) GG could in general trigger an extraterritorial responsibility of the FRG to protect the right of life, the requirements were not met in the case at hand. The BVerwG applied a much stricter test than the OVG NRW (1) regarding the establishment of violations of international law and (2) concerning the condition of a "sufficient link" with the state territory.

First, the BVerwG found that the mere possibility of a violation of international law by another state (in the sense of the "precautionary principle" on which the OVG NRW based its decision) was not sufficient to trigger the responsibility to protect under Article 2 (2) (1) GG of the FRG. Rather, it stated that this duty only arose when, based on the number of violations of international law that have already occurred, and the surrounding circumstances, it could be concretely expected that acts contrary to international law would continue to occur in the future impairing or endangering fundamental rights. With regard to determining what constitutes such a violation of international law by another state, the court held that because of the structural peculiarities of international law, the assessment of the actions of other states under international law may depend on the range of plausible legal arguments. In the case at hand the BVerwG did not consider the assessment of the OVG NRW regarding possible violations of IHL and HRL as sufficient to meet these requirements.

Second, the BVerwG requires a "qualified reference" to German territory. According to the BVerwG such a reference is undoubtedly lacking if the alleged conduct consists in a purely technical transmission process without any decision-making element. In the view of the BVerwG the OVG NRW did not conclusively determine that the involvement of Ramstein in armed drone operations in Yemen also included the evaluation of information or decision-making elements taking place in Germany.

However, the BVerwG did not remand the case to the OVG NRW for further inquiries, as it concluded that even if such violations of international law triggering the responsibility of the FRG were to be affirmed, and even if a "qualified reference" to the German state territory could be established, the FRG by repeatedly consulting with the US government and obtaining an assurance from the US that activities in US military properties in Germany are conducted in accordance with applicable law, was acting within its margin of discretion because the measures could not be qualified as totally inadequate. Thus, the BVerwG granted the German government a wide margin of discretion when fulfilling their obligations under Article 2 (2) (1) GG.

This decision leaves the international lawyer gazing sadly out of the window into the cold November rain for multiple reasons; out of which three aspects are particularly hurtful steps back in the judicial enforcement of international law in comparison to the judgment of the OVG NRW:

The "structural peculiarities of international law"

In its considerations regarding the assessment of a breach of international law through the conduct of a foreign state triggering the FRG's responsibility to protect under Article 2 (2) (1) GG, the BVerwG underlines that because of the structural peculiarities of international law, the assessment of the actions of other states under international law may depend on the range of plausible legal arguments. This gives the German Government a great margin of appreciation concerning the existence and exact content of rules of international law which a court should only second-guess if the Government's position is arbitrary. Even though, this view is in consonance with the established case-law of the German Federal Constitutional Court (BVerfG; see e.g. the Heß Case), the BVerfG itself in its late Varvarin Decisionseemed to depart from this doctrine, demanding lower courts to apply and interpret international law, if legal scrutiny on the basis of objective criteria was possible. The OVG NRW's comprehensive engagement with the relevant provisions of international law in the previous instance gave rise to the hope that courts were willing to take up the challenge and slowly depart from the doctrine which has been striping international law partly of its legal character, rendering its interpretation arbitrary to a great extent. For the moment this hope has been dashed by the BVerwG's decision.

The superelevated threshold of a "concrete danger" for recurring violations of international law and the "qualified reference" to the German territory

Moreover, while the OVG NRW deemed a "violation of international law" and a "sufficient link" with German territory as sufficient to trigger the responsibility of the FRG, the BVerwG demands a "concrete danger" for recurring violations of international law and a "qualified reference" to German territory, raising the threshold for the extraterritorial application of the protective duty under Article 2 (2) (1) GG considerably. It is highly unlikely that these requirements will ever be met in practice, which can be seen in the case at hand, where the OVG NRW went through considerable efforts of establishing violations of IHL and HL through drone strikes in Yemen, still being dismissed by the BVerwG as insufficient. Regarding the "qualified reference" to the German territory it is possible to envision situation where this criterion might be fulfilled, e.g. imagining an American pilot on German soil operating a drone in Yemen. However, the assessment by the BVerwG disregards the fact that such a link may be established by the FRG's permission given to the US to operate a relay station for drone strikes at Ramstein Air Base. But that permission was subject to the condition that US activities on German territory respect German law, especially the GG and German obligations under international law.

A broad margin of discretion in matters of foreign affairs

Lastly, the BVerwG granted the government a broad margin of discretion concerning the fulfilment of the extraterritorial protective duty, holding that as long as its measures could not be qualified as totally inadequate, they were in line with Article 2 (2) (1) GG. This is where the decision does not come as a surprise: the reception of the OVG NRW's decision has shown that putting judicial limits to government conduct in foreign affairs – with complicated diplomatic, and sensitive state security implications, which lie at the heart of state sovereignty – is a difficult balancing act. In practice, the decision of the OVG NRW might have had unbearable consequences for the US-German relations which would have forced the German government to disregard the court's decision, posing an imminent threat to the integrity of the German judicial system and the rule of law. With the decision in question the BVerwG might have spared us this constitutional crisis.

However, in doing so it appears that the BVerwG has lowered again the role national courts may take up in interpreting and enforcing international law. The plaintiffs now have the possibility to lodge a constitutional complaint to the BVerfG and in the last resort turn to the European Court of Human Rights (ECtHR). Hopes thus lie with the BVerfG – which seems in a mood to apply fundamental rights extraterritorially (see the BND judgment of the German Federal Constitutional Court; with a comment on Völkerrechtsblog here) – and with the ECtHR, which has a longstanding tradition of extraterritorial application of human rights. Maybe – after Christmas, in the New Year – the judicial enforcement of international law will experience a second spring.

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